United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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FOR THE SECOND CIRCUIT

DOCKET NO. 75-1072

UNITED STATES OF AMERICA,
APPELLEE

-against-

ROBERT SCHWARTZ,
DEFENDANT-APPELLANT

APPELLANT'S BRIEF

(ON APPEAL FROM FINAL JUDGEMENT AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.)

RONALD J. VENEZIANO MARINO
& VENEZIANO
ATTORNEYS FOR DEFENDANT - APPELLANT.
167 WEST 72nd STREET
NEW YORK, NEW YORK 10023
TELEPHONE: (212) 873-7297

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APPELLANT'S BRIEF
QUESTIONS PRESENTED

1. Was the finding of the Court, after conducting a hearing, that defendant was not given a promise that he would not be prosecuted and - in any event that he did not suffer a detriment, a finding which was not supported by the evidence adduced at the hearing?

2. Did the Court commit reversible error in refusing to allow the introduction into evidence at the hearing of the results of the Polygraph examination taken by the defendant showing defendant to have been truthful?

STATEMENT OF THE CASE
PRELIMINARY STATEMENT

This is an appeal from a decision of the Court denying a motion made by defendant on September 3, 1974 for an order vacating conviction pursuant to agreement with the prosecution. This motion was brought on by defendant after he was convicted

by a jury on July 10, 1974 of violating 21 U.S.C. Sect, 812, 841 (a) (1) and 841 (b) (1) (A) by engaging in a conspiracy to distribute cocaine hydrochloride and also, by substantive possession, and distribution thereof, on March 20, 1973.

After denial of the motion defendant was sentenced by the Court to the custody of the Attorney General for a period of eight (08) years.

Subsequently, after clarification of an error as to defendant's prior criminal record, he was resentenced to the custody of the Attorney General for a period of three and one half (3½) years.

Defendant is currently at liberty, having been released on a fifteen thousand ($15,000 oo/xx) dollar appeal bond pursuant to an order of Judge Charles L. Brieant Jr. entered on July 10. 1974, staying execution of judgement herein pending determination of this appeal.

FACTUAL BACKGROUND

On June 12, 1973, defendant was arrested pursuant to a warrant for various federal narcotic offenses as listed previously. He was taken to 26 Gederal Plaza for processing at which time he agreed to work as a government informer. His efforts initiated three cases, the last of which was opened November 8, 1973, and produced five narcotics arrests.

Defendant contends that Detective Michael Bramble whom he worked with as an informer, told him that if he "cooperated" he would be "indicted, but not prosecuted." This cooperation continued for a period of months after which

defendant was indicted by the Grand Jury for the offenses enumerated of which he now stands convicted. He was brought to trial and found guilty by a jury on July 10, 1974.

On September 3, 1974, defendant made a motion for an order vacating conviction pursuant to an agreement with the prosecution. An evidentiary hearing was held on November 8, 1974.

On January 20, 1975 the Court, in a Memorandum and Order, found that no promise was made and that, in any event - that defendant suffered no detriment as a result of his cooperation with DEA. Pursuant to this finding, the Court denied defendant's motion. In the course of the hearing, the Court refused to allow evidence of the results of defendant's Polygraph test.

Defendant was sentenced on each of the counts upon which he stood conviced to concurrent terms of three and one half (3½) years in the custody of the Attorney General.

POINT ONE

THE FINDING OF THE COURT AFTER A HEARING THAT DEFENDANT WAS NOT GIVEN A PROMISE THAT HE WOULD NOT BE PROSECUTED - AND - IN ANY EVENT - DID NOT SUFFER ANY DETRIMENT AS A RESULT - IS A FINDING WHICH IS NOT SUPPORTED BY THE EVIDENCE, IN THAT, THE COURT'S FINDING THAT DEFENDANT SUFFERED NO DETRIMENT BECAUSE HE EXPECTED "TO BE INDICTED BUT NOT PROSECUTED" THEREBY RENDERING DEFENDANT'S FAILURE TO REQUEST PERMISSION TO TESTIFY ON HIS OWN BEHALF BEFORE THE GRAND JURY AS MOOT, DOES

NOT MEET THE ISSUE, AND, IN FACT, AVOIDS AND CIRCUMVENTS THE ISSUE:

Defendant does not content that he was given immunity from prosecution by virtue of Detective Bramble's statement. Defendant does contend that he has suffered substantial and severe detriment because of his cooperation with the Government in that agent Bramble, acting for the Government promised him that he would be "indicted but not prosecuted." (Direct examination of Robert Schwartz - Evidentiary Hearing - November 8, 1974 - Page 6 of hearing minutes - lines 7 to 16:)

> "Q. Well, were they more specific? Did they tell you the form they wanted this cooperation to take?
>
> A. Yes, they did. What they said was in exchange for my immunity--
>
> Q. I'm sorry, in exchange for your what?
>
> A. In exchange for my not being prosecuted, they told me I would be indicted but not prosecuted, if I were able to assist them in making--first they asked for three arrests. I said I didn't know about three. I said maybe I could cooperate with two."

This promise of indictment and of later non-prosecution served to "lull" defendant into not exercising his rights at a very crucial period during the process of his case. Had defendant known that the Government, through agent Bramble was going to renege on its promise, defendant would have petitioned the Grand Jury to be allowed to testify before that body on his

own behalf. Had defendant known that the promise would be broken and that he would be prosecuted - he could have related the fact of his cooperation and the broken promise to the Grand Jury. The Grand Jurors could, conceivably, have been sufficiently upset by the manifest injustice of the situation to decide not to indict the defendant for the crimes for which he was charged.

It is accepted law that the Grand Jury has unfettered discretion to return - or not to return a true bill.

Federal Rules of Criminal Procedure. Rule 6 (F)

"An indictment may be found only upon the concurrence of twelve or more jururs."

During this crucial period of defendant's case - as the Grand Jury was hearing the evidence presented against him, defendant saw no cause for alarm because he was relying on the promise of Agent Bramble that he would be indicted - but not prosecuted. At the Grand Jury state he felt the case was going as he was promised it would go - he was, in belief of what Agent Bramble told him - prepared to expect indictment - relying on the ultimate promise of non-prosecution in return for his cooperation. As such, he lost his opportunity to ask the Grand Jury to hear his testimony as to the promise. Later, when the promise of non-prosecution was broken - it was - at that point - far too late for him to ask to testify before the Grand Jury.

The wording of the Courts Memorandum and Order denying defendant's motion on January 20, 1975 illustrates that its decision was not supported by the evidence. Pages 4 to 6 of Memorandum and Order. The Court does find that a promise was made that defendant would have to provide four cases - but declines to find a promise not to prosecute. The Court further states (p. 5)

"Defendant suffered no detriment; according to his theory of the promise, he was in any event to be indicted--it was merely the prosecution which was to be withheld."

Obviously, the detriment consisted not of defendant's being indicted - but of his reliance on the promise that even though indicted, the ultimate prosecution would not follow. (Emphasis added). When the Court says that it was merely the prosecution that was to be withheld it misses the point. It avoids and circumvents the issue. The issue was the ultimate prosecution or lack thereof. Defendant did not care if he was indicted - as long as the promise was kept and he was not ultimately prosecuted. Defendant's ability to testify before the Grant Jury was necessary to forestall prosecution by virtue of the broken promise by attempting to convince the Grand Jury that under the circumstances, justice demanded that he not be indicted. Believing the promise that the prosecution would never take place, he saw no need to testify on his own behalf - and this precisely is his detriment.

The Court's finding that the promise alleged to have been made to defendant was not made is not supported by the

evidence in that the grounds for the Court's disbelief of defendant as given by the Court on pp. 5 & 6 of its decision are unreasonable:

"The form attributed to the alleged promise is absurd; to dispose of an indictment by nolle prosse order in this district requires more difficulty than making the simple decision not to present the case to the Grand Jury, or not to sign the indictment when returned."

This language assumes that defendant - who is a layman is possessed of complete and specific knowledge of the inner administrative workings of the Court and the Grand Jury - and the Federal Rules of Criminal Procedure and the Policy of Southern District which knowledge, logically, would be had only by Judges, Prosecutors, Attorneys in Federal Practice and other appropriate Court personnel familiar with the procedure. To disbelieve defendant because he, as a layman was not possessed of such intricate and specialized knowledge is illogical and unreasonable. As such the finding of the Court as to the alleged promise made was not supported by the evidence at least, in part, because the grounds set forth by the Court for its disbelief of defendant was lacking in reasonableness.

POINT TWO

THE COURT ERRED IN NOT ALLOWING THE RESULTS OF THE POLYGRAPH EXAMINATION TAKEN BY DEFENDANT TO BE INTRODUCED INTO EVIDENCE AT THE HEARING BECAUSE, HAD THE COURT FOUND A PROMISE WAS MADE, DEFENDANT COULD HAVE PETITIONED THE GRAND JURY AND, AS THE GRAND JURY MAY HEAR EVIDENCE INADMISSABLE AT TRIAL -

THE GRAND JURY COULD HAVE HEARD THE POLYGRAPH RESULTS IF THEY SO CHOSE TO.

It is conceded that, normally, polygraph evidence is inadmissable in judicial proceedings. Here, however, the polygraph evidence should have been admitted because had defendant's motion been granted, theoretically he could have gone back to the Grand Jury where the polygraph evidence might well have been admissable.

Many types of evidence clearly inadmissable at trial may be admitted before the Grand Jury, such as evidence illegally obtained in violation of 5th Amendment rights (U.S. v. Blue 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d. 510.), hearsay evidence (Costello v. United States 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397), (Lawn v. United States 355 U. S. 339, also see 8 Wigmore, Evidence, 2184, etc.).

The rationale is stated:

> "If testimony is incompetent at trial yet substantial and rationally persuasive evidence in terms of tending to prove the allegation advanced - it should be admissable in the Grand Jury for purposes of obtaining an indictment."
> Holt v. United States 218 U.S. 245.

If these categories of evidence, not admissable at trial are admissable in the Grand Jury - a persuasive case could be made for Polygraph evidence - inadmissable at trial also being admissable in the Grand Jury. If such testimony

is allowable for obtaining an indictment - it ought also be allowable on behalf of defendant for purposes of attempting to persuade the Grand Jury not to indict.

Therefore, this polygraph evidence should have been admitted at the hearing because otherwise an incongrous result would occur--defendant would have to surmount a hearing where the polygraph evidence could not be heard - in order to reach the Grant Jury where the polygraph evidence probably could be heard. (Emphasis added).

Of course, in this case, in view of defendant's trial having been completed - double jeopardy would have attached rendering the resubmission of the case - together with defendant's testimony to the Grant Jury as academic.

CONCLUSION:

The judgement of conviction should be vacated. The order of the Court denying defendant's motion should be vacated and defendant's motion to set aside his conviction granted.

Respectfully Submitted
RONALD J. VENEZIANO
MARINO & VENEZIANO
Attorneys for Appellant

Dated New York, N. Y.
April, 1975